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IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1978

No. **78-861**

JOSEPH LAVONNIE GLASSCOCK,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the
Tennessee Court of Criminal Appeals

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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The respondent respectfully submits that the petition for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals in the instant case is published and appears at 570 S.W.2d 354. The per curiam opinion of the Tennessee Supreme Court denying petitioner's petition for writ of certiorari is unpublished and appears in the appendix to petitioner's petition for writ of certiorari to this Court.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Petitioner essentially presents the following questions for review:

1. Whether petitioner's conviction for habitual criminality constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution.
2. Whether petitioner's conviction for habitual criminality constituted double jeopardy and violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.
3. Whether the trial court's refusal to charge petitioner's requested special jury instructions violated petitioner's rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.
4. Whether the trial court's denial of petitioner's pre-trial motions violated petitioner's rights to due process and equal protection under the Fifth and Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution:

No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . .

2. Eighth Amendment to the United States Constitution:

Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted.

3. Fourteenth Amendment to the United States Constitution:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

On January 21, 1977, petitioner was indicted by the Shelby County Grand Jury for third degree burglary, larceny, and habitual criminality (case No. B-56058), and grand larceny and habitual criminality (case No. B-56059).

The trial in case No. B-56058 commenced on March 2, 1977, on petitioner's plea of not guilty by reason of criminal insanity, and continued until March 3, 1977, whereupon after due deliberation the jury found petitioner guilty of third degree burglary and assessed his punishment at imprisonment in the state penitentiary for not less than six years nor more than ten years. Subsequently, the jury found petitioner not guilty of habitual criminality. On March 24, 1977, petitioner filed a motion for new trial, which motion was overruled on April 1, 1977.

The trial in case No. B-56059 commenced on March 28, 1977, upon petitioner's plea of not guilty and not guilty by reason of insanity, and continued until March 30, 1977, whereupon after due deliberation the jury found petitioner guilty of grand larceny and subsequently found him guilty of habitual criminality. Petitioner's punishment was fixed at imprisonment in the state penitentiary for life. On April 20, 1977, petitioner

filed a motion for new trial, which motion was overruled on May 6, 1977.

Petitioner perfected appeals to the Court of Criminal Appeals in both of the above-mentioned cases. The Court of Criminal Appeals consolidated the cases for purposes of appeal and, on March 23, 1978, affirmed the judgments of the trial court. On July 6, 1978, the Tennessee Supreme Court denied petitioner's petition for writ of certiorari in these cases.

REASONS FOR DENYING THE WRIT

Respondent respectfully insists that the instant petition for writ of certiorari should be denied since the judgment of the Tennessee Court of Criminal Appeals in the present cases does not involve any federal question of substance not heretofore determined by this Court or not decided in accord with applicable decisions of this Court. See Supreme Court Rule 19(1)(a).

A

In the first question presented to this Court by petitioner, petitioner contends that his conviction for habitual criminality constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. However, this issue was not directly considered by the Tennessee Court of Criminal Appeals in the present case. In that court, petitioner assigned as error the actions of the trial court in refusing to order the taking of pre-trial interrogatories aimed at establishing selective enforcement of the habitual criminal statute and in refusing to allow voir dire of prospective jurors concerning their predelictions toward the imposition of the mandatory life sentence required by Tenn. Code Ann. §40-2806 upon a determination of habitual criminality. The Tennessee Court of Criminal Appeals found no merit to these assigned errors since Tennessee's habitual criminal statute ". . . is immune from constitutional attack such as that launched by this defendant . . ." *Glasscock v. State*, 570 S.W.2d 354, 355 (Tenn. Crim. App. 1978). More specifically, the Court of Criminal Appeals found that:

The courts of Tennessee have repeatedly held that the state's habitual criminal statute does not violate the due process or equal protection provisions or the state and federal constitutions nor does its imposition result in cruel and unusual punishment. See, e.g., *State ex rel. Ves v.*

Bomar, 213 Tenn. 487, 376 S.W.2d 446 (1964); *Hobby v. State*, 499 S.W.2d 956 (Tenn. Crim. App. 1973); see also *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962), holding that selective enforcement of recidivist statutes is not unconstitutional; cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). *Id.*

Inasmuch as the decision of the Court of Criminal Appeals was grounded upon assigned errors regarding procedural issues at trial, said decision did not determine any federal question and, in particular, did not determine whether petitioner's conviction in fact constituted cruel and unusual punishment under the Eighth Amendment to the federal constitution.

B

In the second question presented to this Court by petitioner, petitioner contends that his conviction for habitual criminality placed him twice in jeopardy for the same offense, in violation of the Fifth Amendment, and also violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. However, a review of the decision of the Tennessee Court of Criminal Appeals indicates that, while the Court did decide that petitioner's conviction for habitual criminality was not violative of double jeopardy, the Court did not decide whether such a conviction violated petitioner's federal constitutional rights to due process or equal protection.

With respect to the double jeopardy issue, respondent submits that the decision of the Tennessee Court of Criminal Appeals did not decide a federal question of substance not heretofore determined by this Court or not in accord with applicable decisions of this Court. Tennessee's habitual criminal statute does not create an independent crime, but defines and pre-

scribes a status arising from circumstances under which the penalty for violating one of the prescribed felonies charged on the same indictment is increased to life imprisonment. *Pearson v. State*, 521 S.W.2d 225 (Tenn. 1975); *Harrison v. State*, 217 Tenn. 31, 394 S.W.2d 713 (1965); *Canupp v. State*, 460 S.W. 2d 382 (Tenn. Crim. App. 1970). Since habitual criminality is a status or a vehicle for the enhancement of punishment, incidental to and dependent upon the most recent conviction, as opposed to an independent crime, jeopardy does not attach when the same prior convictions are used in separate cases to establish habitual criminality.

Thus, a finding of habitual criminality in one case does not bar a subsequent finding of habitual criminality, based upon the same prior convictions, in another case. *Pearson v. State, supra*. Likewise, an "acquittal" of habitual criminality in one case does not bar a subsequent finding of habitual criminality, based upon the same prior convictions, in another case since the "acquittal" of habitual criminality in the former case is not an acquittal of a substantive offense, does not erase the historical fact of the prior convictions, and does not affect the use of such prior convictions to enhance punishment in the latter case. See *Davis v. Bennett*, 400 F.2d 279, 282 (8th Cir. 1968), *cert. denied*, 395 U.S. 980; *Branch v. Beto*, 364 F. Supp. 938, 942 (S.D. Tex. 1973).

In the present case, petitioner's conviction for habitual criminality in case number B-56059 was based upon the same convictions which had been used as the basis for an habitual criminal charge in case number B-56058 where petitioner was found not to be an habitual criminal. As concluded by the Tennessee Court of Criminal Appeals, the action of the first jury regarding the habitual criminal count did not operate to "acquit" the petitioner of the underlying convictions recited in that count and thus did not bar the enumeration of those convictions in any subsequent case also involving a habitual criminal count. *Glasscock v. State, supra* at 355.

C

In the third question presented to this Court by petitioner, petitioner contends that the refusal of the trial court to give petitioner's requested special jury instruction violated petitioner's rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. However, the decision of the Court of Criminal Appeals involved an interpretation of state law and in no way involved a substantial federal question.

More specifically, the Court of Criminal Appeals found that the trial court had correctly refused petitioner's requested special jury instruction since (1) much of the requested material had in fact been fully and correctly charged by the trial judge, and (2) the remaining portion of the request was improper under controlling state law. *Glasscock v. State, supra* at 355-356. In so holding, the Court of Criminal Appeals made no determination as to whether the trial court, in so ruling, denied petitioner's federal constitutional rights to due process and equal protection. Accordingly, no federal question was presented or decided by the Court of Criminal Appeals in finding that petitioner's requested special jury instruction was properly refused by the trial court.

D

In the final question presented to this Court by petitioner, petitioner contends that the trial court's denial of his pre-trial motions violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. The pre-trial motions in question concerned a request to take pre-trial interrogatories aimed at establishing selective enforcement of the habitual criminal statute. As heretofore indicated in section A of respondent's argument, the Court of Criminal Appeals, in reviewing this assigned error on appeal, did not decide any substantial federal ques-

tion. More particularly, the Court of Criminal Appeals did not decide whether the action of the trial court in refusing such a pre-trial motion denied petitioner his federal constitutional rights to due process or equal protection.

CONCLUSION

For the reasons stated herein, respondent respectfully insists that, in affirming petitioner's convictions, the Tennessee Court of Criminal Appeals did not decide a federal question of substance not heretofore determined by this Court nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause, and accordingly, the instant petition should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing Brief have been forwarded to Mr. J. D. Cobb, Ms. Janet Leech Richards, 99 North Third Street, Memphis, TN 38103, and Mr. James L. Elliott, 9 North Second Street, Suite 1830, Memphis, TN 38103, Attorneys for Petitioner, this 14th day of February, 1979.